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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-152

WILLIAM R. MING, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1972, and a petition for rehearing was denied on June 26, 1972. (Pet. App. 1a, 17a.) The petition for a writ of certiorari was filed on July 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury concerning the element of willfulness in 26 U.S.C. 7203.

2. Whether petitioner was denied a fair trial by reason of the introduction in evidence of an Internal Revenue Service certificate of assessments and payments.

3. Whether the trial court erred in limiting petitioner to three peremptory challenges.

4. Whether petitioner was denied due process by reason of certain rulings, instructions, and comments of the trial judge, or by a question asked by the prosecutor.

5. Whether the trial judge abused his discretion in denying petitioner's pretrial motion requesting that the judge recuse himself on the ground of bias and prejudice.

STATUTES INVOLVED

Sections 7201 and 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) and Rule 24(b) of the Federal Rules of Criminal Procedure are printed in the Appendix, *infra*, pp. 13-14.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all counts of a four-count information charging that he willfully failed to file timely federal income tax returns for the years 1963, 1964, 1965, and 1966, in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to consecutive

four-month terms and to $1,250 fines on each of the four counts. It is undisputed that petitioner, a lawyer, failed to file returns for those years when they were due and that his gross income required him to file returns. Petitioner's evidence was directed to whether his failure to file was willful, within the meaning of Section 7203. (Pet. App. 1a-3a.)

Petitioner conceded that when each return here involved was due, he was aware that it was due, yet failed to file it (R. 168).[1] The returns here involved were not filed until October 1967 (R. 48-49). Petitioner had explained to a revenue agent that he was too busy to file returns (R. 47-49).

The trial court instructed the jury that the essential elements of a violation of Section 7203 are (1) that the defendant be a person who is required by law to make a return, (2) that the defendant failed to make a return at the time required by law, and (3) that such failure must be found to have been willful (R. 252). The court instructed that when used in Section 7203, "the word 'willful' means 'voluntary, purposeful, deliberate and intentional as distinguished from accidental, inadvertent or negligent' " (R. 253-254). The court stated further (R. 254):

> I charge you that the only bad purpose necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew he was required to file at the time he was required to file them.

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[1] "R." refers to the record appendix filed in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 12-20) that the courts below erred in their interpretation of the word, "willfully," as used in Section 7203 of the Internal Revenue Code of 1954, Appendix, *infra*, which makes it a misdemeanor if any person, *inter alia*, "willfully fails to * * * make such return * * * at the time or times required by law or regulations." Petitioner urges that Section 7203 should be limited to those who "have a criminal intent when they fail to comply with the tax laws" (Pet. 13), and defines such intent as the same intent as in the case of a defendant charged with the felony of willfully attempting to evade a tax, proscribed by Section 7201 of the Code (Pet. 15).[2]

(a) The jury was correctly instructed on the meaning of willfulness in Section 7203, *viz.*, that it means "voluntary, purposeful, deliberate and intentional as distinguished from accidental, inadvertent or negligent" (R. 253-254), and that the only bad purpose required for conviction is "the deliberate intention not to file returns which the defendant knew he was required to file at the time he was required to file them" (R. 254). This instruction is completely in accord with the views of this Court (see *Spies* v. *United States*, 317 U.S. 492, and *Sansone* v. *United States*, 380 U.S. 343) and is not in conflict with *United States* v. *Mur-*

[2] The *amici* brief simply asserts (Br. 5-6) that there is confusion and conflict among the circuits (an essentially mistaken impression, as we shall show), without suggesting any more proper understanding of the willfulness element.

dock, 290 U.S. 389, as petitioner contends (Pet. 13-15).[3]

In *Spies* v. *United States, supra,* this Court stated that a deliberate failure to file a timely return constitutes a violation of Section 7203, regardless of whether any tax is due. And in *Sansone* v. *United States, supra,* this Court recognized (380 U.S. at 354) that "an intent to report and pay the tax in the future does not vitiate" the willfulness requirement of Section 7203. These opinions clearly indicate the error of petitioner's contention (Pet. 15) that willfulness within the meaning of Section 7203 necessarily involves an intent to evade the payment of tax.[4]

In *Spies,* this Court explained why a criminal sanction is needed to enforce the timely filing of tax returns, whether or not a tax is owed, stating (317 U.S. at 495-496):

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[3] In *United States* v. *Murdock, supra,* the petitioner was prosecuted for willfully failing to supply information to a revenue agent. He had declined to do so, invoking the privilege against self-incrimination. This court held that there was no offense if the petitioner believed in good faith that, in view of the constitutional privilege, he had the right to refuse to supply the information. Obviously, the present case is entirely distinguishable, since petitioner has never asserted that he believed that he had a right not to file his income tax returns on time and the jury was instructed that there must be a "deliberate intention not to file returns which the defendant *knew* he was required to file * * *" (R. 254, emphasis added).

[4] In *United States* v. *Platt,* 435 F. 2d 789, 793-795 (C.A. 2), involving instructions similar to those given in the present case, Judge Friendly's opinion for the court succinctly demonstrated the correctness of such instructions in light of *Spies* and *Sansone.*

> The failure in a duty to make a timely return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145 (a). Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.[5]

Petitioner is mistaken in suggesting (Pet. 15-17) that *Sansone* supports his criticism of the jury instruction here involved. The portion of the *Sansone* opinion which petitioner quotes (Pet. 15-16) demonstrates merely that, on the facts of a particular case, there may be a violation of both Sections 7201 and 7203, with no differentiating fact to be found by the jury (and hence no need for a lesser included offense instruction). That

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[5] In making a specified amount of gross income the touchstone of the requirement that a return be filed (see Section 6012(a)(1) of the Code), Congress obviously intended to supply the revenue authorities with timely information from which they, rather than solely the taxpayer, could ascertain whether a tax liability exists.

was so in *Sansone,* since the charge was that the petitioner had intentionally omitted certain income from his return which he knew he should have included.[6] It does not follow that every violation of Section 7203 will also be a violation of Section 7201, or that there must always be an intent to evade a tax for a violation of Section 7203. As already shown, where the offense is a failure to file a return at the time required by law, there need be no intent to evade tax, because the offense is committed even though no tax is due.

(b) Petitioner (Pet. 17) and the *amici curiae* (Br. 6) assert the existence of a conflict among the courts of appeals, citing *Haner* v. *United States,* 315 F. 2d 792 (C.A. 5), and *United States* v. *Vitiello,* 363 F. 2d 240 (C.A. 3). Those opinions, however, do not indicate that either the Third or the Fifth Circuit would, on the facts of this case, have reached a conclusion different from that of the court below. In both cases, the reversals were based on the belief that the jury instructions (permitting conviction on a finding of "careless disregard" of a legal duty) permitted conviction merely on a finding of a careless or negligent failure to file returns. Here, in contrast, the jury was explicitly instructed that "willful" does not mean "accidental, inadvertent or negligent" (R. 253-254).

Petitioner and the *amici curiae* also refer (Pet. 17; Br. 6) to cases in the Ninth Circuit. The only difference suggested by the Ninth Circuit cases, however, lies in

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[6] By so doing, the petitioner had willfully failed to pay his taxes at the time required by law, in violation of Section 7203 (380 U.S. at 345), but the same facts also showed a willful attempt to evade tax in violation of Section 7201.

the fact that the Ninth Circuit sanctions a form of instruction which is less favorable to a taxpayer charged with a failure to file a timely return. See *United States* v. *Fahey*, 411 F. 2d 1213, 1214, certiorari denied, 396 U.S. 957, where the Ninth Circuit reaffirmed its approval of instructions defining "willfully" as "without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act." As the Ninth Circuit noted (411 F. 2d at 1214), this type of instruction was rejected by the Fifth and Third Circuits in *Haner* and *Vitiello, supra.* It was also, in effect, rejected in the instant case, as we have shown. Obviously, petitioner has no basis for seeking further review, merely because he received more favorable jury instructions than he might have if he had been prosecuted within the Ninth Circuit.[7]

2. Petitioner misinterprets the evidence at the trial in contending (Pet. 20-26) that he was prejudiced by the introduction of a certificate (Pet. App. 18a) concerning his tax assessments and payments. The jury could not have been led to believe from that certificate that petitioner had never filed the returns—as he concededly did, albeit untimely. The Revenue Service employee who prepared the certificate explained in her testimony that she had searched only for records of returns filed on time (R. 57-69). Similarly, the prosecutor in his closing statement argued merely that petitioner had consist-

[7] Thus this case need not be held for disposition of *United States* v. *Bishop*, No. 71-1698, in which the government seeks to challenge the Ninth Circuit rule in the context of a lesser-included offense instruction.

ently failed to file his returns when they were due (R. 223).

3. Petitioner asserts (Pet. 26-29) that he was prejudiced because the trial court permitted each side only three peremptory challenges to the jury. He contends that Rule 24(b) of the Federal Rules of Criminal Procedure (App. *infra,* p. 14) should be interpreted to require allowance of a larger number. Reasonably interpreted, however, Rule 24(b) simply distinguishes between felonies and misdemeanors, granting the defendant ten peremptory challenges in a felony trial and three in a trial for a misdemeanor. Petitioner cites no authority for his view (Pet. 27) that a trial on several misdemeanor counts creates a right to exercise more peremptory challenges. Contrary to petitioner's contention is *Nestlerode* v. *United States,* 122 F. 2d 56, 58-59 (C.A. D.C.).

4. Petitioner cites a number of alleged trial errors (Pet. 29-33) in support of the broad assertion that he suffered "a general denial of due process of law" (Pet. 29). The criticisms are without merit.

(a) Both the petitioner (Pet. 31) and the *amici curiae* (Br. 6-8) complain of the fact that the trial court admitted "evidence of previous failure to file timely returns" (Pet. 31), but excluded evidence proffered by petitioner to show that he paid his taxes before the initiation of prosecution. The *amici curiae* contend that these rulings are inconsistent and reveal "inconsistent constructions" of Section 7203 by the courts below (Br. 7-8).

Both rulings were correct. Evidence that petitioner

ultimately and belatedly paid his taxes might be relevant if an intention to evade tax were an element of the misdemeanor here involved, but, as we have shown, that clearly is not the case.[8] On the other hand, the evidence of a past history of belated filing of returns was properly admitted (R. 62, 64), as showing a "pattern of conduct" (R. 62). This evidence, although hardly essential to the government's case, had a tendency to show that the late filing of the returns specified in the indictment was not "accidental, inadvertent or negligent" (R. 254). Its admission did not depend upon adoption of petitioner's theory (Pet. 15) that Section 7203 requires an intent to evade the payment of taxes.

(b) Petitioner complains (Pet. 29-30) of the fact that when he was interviewed by revenue agents at his own law office in November 1967, he was not advised of his constitutional rights and was not so advised until some later date. Suffice it to say that this case, involving a lawyer, is hardly a suitable vehicle for reviewing the question whether *Miranda* v. *Arizona,* 384 U.S. 436, should be extended to noncustodial interviews by revenue agents. This Court has frequently declined to review that proposition. See, *e.g., United States* v. *White,*

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[8] The particular point of dispute at the trial involved an effort by the defense to introduce in evidence five checks showing payments by petitioner to the Internal Revenue Service (R. 159). The court excluded the checks, observing that "the fact of payment is not an issue" (R. 162). Evidence had already been admitted, showing that petitioner's returns for 1964, 1965, and 1966 were filed on October 11, 1967 (R. 42-43). There had also been evidence of the late filing of other returns (R. 76). There was evidence that petitioner had come under tax investigation and that revenue agents had communicated with him before he filed the various returns in question (R. 42, 74).

417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Miriani,* 422 F.2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *Prudden,* 424 F.2d 1021 (C.A. 5), certiorari denied, 400 U.S. 831; *United States* v. *MacLeod,* 436 F. 2d 947 (C.A. 8), certiorari denied, 402 U.S. 907. Similarly, this case is not a suitable one for considering the impact of the Internal Revenue Service regulation (Pet. 29-30), adopted only a few weeks before petitioner was interviewed, requiring that certain warnings should be given "If the potential criminal aspects * * * are not resolved by preliminary inquiries."

(c) Petitioner's remaining criticisms (Pet. 31-33) concerning alleged prejudice and trial error were sufficiently considered and properly rejected by the court of appeals (Pet. App. 7a-11a).[9]

5. The court of appeals did not err in rejecting (Pet. App. 4a-5a) the contention (Pet. 33-35) that Judge Hoffman was obliged to recuse himself because of petitioner's motion and affidavit requesting that he do so. To be sufficient, such an affidavit must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States,* 255 U.S. 22, 33-34; *Rosen* v. *Sugarman,* 357 F. 2d 794, 797-798 (C.A. 2). Here, the affidavit (Pet. App.

[9] For example, "partisan political implications" (Pet. 32) were supposedly shown by a single question asked by the prosecutor, as to whether petitioner had voted in the "Democratic Primary Election in April of 1964" (R. 172). The purpose of the question was to show that petitioner was not too busy to vote (R. 171). Petitioner had previously volunteered information which at least suggested his party affiliation (R. 141), and his counsel made no objection when the question now under challenge was asked (R. 172).

45a-49a) contained no allegations of any substance and was self-defeating, since petitioner also stated that he "has known Judge Julius J. Hoffman for many years and has a high regard for him" and "believes the high personal regard to be mutual" (Pet. App. 48a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or

imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

Rule 24. TRIAL JURORS

* * * * *

(b) *Peremptory Challenges.* If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

* * * * *

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